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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-

CHARLES A. MITCHELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, CHARLES A. MITCHELL ("Mitchell") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, affirming his conviction by the United States District Court for the Northern District of Mississippi on an indictment charging him with transporting "falsely made" securities in interstate commerce.

OPINIONS BELOW

The opinion of the Court of Appeals, dated January 25, 1979, and reprinted as Appendix A, *infra*, is reported at 588 F.2d 481. The District Court rendered no formal opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on January 25, 1979. Appendix B, *infra*. A timely petition for panel rehearing was denied February 28, 1979. Appendix C, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254.

QUESTIONS PRESENTED

Whether the Court of Appeals has rendered a decision in conflict with the decisions of other Courts of Appeal on the same matter, and whether the decision for which review is sought, on undisputed facts, would deny petitioner liberty without due process of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time or War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

18 U.S.C. § 2:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

> "(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

18 U.S.C. § 2314:

* * * *

> "Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

* * * *

> "Shall be fined not more than $10,000.00 or imprisoned not more than ten years, or both.
>
> "This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country."

STATEMENT OF THE CASE

Mitchell was indicted September 15, 1977, on five counts [Appendix D, *infra*]. Count One charged a conspiracy between Mitchell and one Boyd L. Hobbs ("Hobbs") to (1) make false statements and to overvalue securities for the purpose of influencing the action of banks the deposits of which were insured by the FDIC, and (2) to transport "falsely made securities" in interstate commerce. Counts Two, Three and Five charged Mitchell with transporting four specific, "falsely made" savings certificates, issued by the Columbus Savings and Loan Association ("Association"), in interstate commerce. Count Four charged a false statement made "for the purpose of influencing the action of The Citizens Bank of Hattiesburg . . . [in making a loan secured

by a specific savings certificate knowing] that the certificate had been back-dated and the funds represented by said certificate had not been deposited with" the Association.

On October 17, 1977, Mitchell filed a motion to dismiss the indictment for failure to charge an offense against the United States [Record ("R"), 20]. The motion was overruled December 6, 1977 [R, 33]. He moved for judgment of acquittal at the close of the Government's case [Transcript ("T"), 849-855] and again after both prosecution and defense had rested [T, 1019].

After trial to a jury, a verdict was returned finding Mitchell "Not Guilty" on Counts One and Four and "Guilty" on Counts Two, Three and Five [R, 33(a)]. After judgment, Mitchell moved for judgment of acquittal on Counts Two, Three and Five or in the alternative for a new trial [R, 43], which was overruled [R, 48].

Surprisingly enough for a criminal case, there is virtually no dispute in the facts. Where there is a question, we state the facts in the light most favorable to the Government [*Glasser* v. *U.S.*, 315 U.S. 80 (1941)], footnoting our views on crucial points. We do not want to overstate the facts, but some background is needed for an understanding of this case.

The Association was a state-chartered savings and loan association located at Columbus, Mississippi, with its deposits privately insured by the American Savings Insurance Company [T, 460]. There was no connection with any federal agency.

Mitchell was hired in September of 1967 at a time when the Association's assets totalled approximate $1.8 millions and it was losing money [T, 867]. He became president in January of the following year, and acted

as chief executive officer until April of 1973 when he was relieved of virtually all authority [T, 869, 874]. Comparing year-end financial reports of the Association for the period 1967 through 1972 [Defendant's Exhibit 1, T, 728], the last full year he served as chief executive officer, we note: cash plus deposits with other savings and loan associations increased by $3.5 millions, or 12.3 times; loans increased by $32.9 millions, or 15.8 times; savings increased by $32.4 millions, or 14.2 times; and total capital, surplus and reserves increased by $1.9 millions, or 10.9 times. There is no shred of evidence Mitchell received any personal benefits other than salary and bonuses paid him by the Association. All of the dealings under scrutiny were with Hobbs, who testified that Mitchell

> ". . . never received one cent from any Boyd L. or Boyd L. Hobbs related companies, and unto [sic] my knowledge Charles Mitchell never received one cent that was not due him from Columbus Savings and Loan for his services as President of that savings and loan . . ."

and that the same was true as to Mitchell's wife or any of his family or as to anyone known to Hobbs connected with Mitchell [T, 675].

Hobbs was in the construction, development and insurance business on a substantial scale [T, 869], building shopping centers, apartment complexes and Ramada Inns. As of May 1, 1972, his net worth was approximately $3.9 millions [T, 294]; by the end of the year, his personal financial statement showed unencumbered cash and equivalent between $1.0 and $1.2 millions and an approximate net worth of between $10 and $12 millions [T, 644-645]. Hobbs and his related companies had $3.5 to $4 millions on deposit with the Association [T, 783]. They were the Association's biggest customers with aggregate loans of $12 to $15 millions. Thorough credit investigations of Hobbs had been made [T, 900-

901] which were continually up-dated [T, 936-937]. Prior to April of 1973, several months after the transactions involved here, no Hobbs check had ever been dishonored [T, 906]. As security for any indebtedness due the Association from Hobbs, Mitchell held a continuing blanket guaranty, signed by Hobbs and his wife, covering everything they owned [T, 907-908].

Hobbs considered that by having substantial savings certificates with the Association, it would enhance his position with them and assist him in obtaining construction loans [T, 633-634]. His reasoning was that as the Association grew, its ability to supply construction money would increase, he could secure his interim and permanent loans from the same lender, he could obtain longer term financing than with banks thus reducing cash outlays for debt service, and could obtain loans for higher percentages of the cost than from insurance companies or banks [T, 663-673, 540-542]. The arrangements on savings certificates bottoming Mitchell's conviction were considered for his, Hobbs', benefit and he did it on his own [T, 530].

There is no factual dispute as to the "fradudulent scheme" which is the basis of petitioner's conviction, and the same pattern of facts is common to each transaction. Count One of the indictment lists fifteen transactions. Ten of the transactions occurred before September 15, 1972, involved an aggregate of $1,080,000.00 in savings certificates, and are all barred by the statute of limitations [18 U.S.C. § 3282]. The remaining five transactions, involving an aggregate of $600,000.00 in savings certificates, are specifically identified in Counts Two through Five, inclusive. Taking the evidence in the light most favorable to the Government, what happened was:

1. Hobbs would make prior arrangements with a pledgee bank for a loan to be secured by an Association savings certificate.

2. Hobbs would give the Association a check for the full amount of the savings certificate. Evidence is silent as to whether the check would be drawn on the pledgee bank or another bank, but does show that Hobbs had open lines of credit of approximately $5 millions with [T, 582], and did business with First National Bank of Aliceville (Alabama), First State Bank in Tuscaloosa (Alabama), Peoples Bank of Selma (Alabama), Security State Bank of Starkville (Mississippi), Bank of Mississippi in Tupelo (Mississippi), Citizens Bank in Tupelo (Mississippi), First National Bank in Birmingham (Alabama), First National Bank in Montgomery (Alabama), First National Bank of Boston (Massachusetts), First National Bank of Chicago (Illinois), First National Bank of Dallas (Texas), and Union Planters National Bank in Memphis (Tennessee). [T, 641-642]. For the purposes of this petition, we shall assume that there were insufficient funds on deposit in the drawee bank [1] to pay the check if presented immediately, but point out that the only direct evidence on the point is Hobbs' testimony that he did not know, and could not tell without examining his records, whether any specific check would have been good or not, but that it may or may not have been good [T, 529, 565-566].

3. The Association would accept Hobbs' check as payment [T, 465], and issue the savings certificate, typically in the amount of $100,000.00. In each instance involved in Counts Two, Three and Five, the actual date of issue was the date of the assignment and acknowledgement, but the certificates themselves were antedated. Specifically, Certificate 7960 was dated December 29, 1971, but issued October 31, 1972; Certificates 9071 and 9072 were dated October 18, 1972, but issued December 18, 1972; and Certificate 9366 was dated January 19, 1973, but issued March 26, 1973.

[1] The drawee bank is not identified by any evidence and may or may not have been the pledgee bank.

4. Simultaneous with the issue of each savings certificate identified in Counts Two, Three and Five, Hobbs would execute an assignment as follows:

> "For value received and as collateral security for a loan to be made to Boyd L. Hobbs by [naming each bank], I, Boyd L. Hobbs do hereby transfer and assign to the said [bank] Certificate[s] no. [inserting number or numbers] in the amount of [stating amount] deposited in Columbus Savings and Loan Association, Columbus, Mississippi. I hereby authorize said Columbus Savings and Loan Association to make payment of said certificate[s] to [bank], in the event of default of payment of the above mentioned loan, and I agree that this assignment shall remain in full force and effect until the loan both principal and interest, has been paid in full."
>
> Government Exhibit 12(d); see, also, Government Exhibits 6(e) and 15(d).

5. Before release of the savings certificate to Hobbs, the Association would acknowledge the assignment using the following language:

> "Columbus Savings and Loan Association, Columbus, Mississippi, hereby acknowledges receipt of the above Assignment and agrees to honor the terms of the assignment until it has received notice of cancellation in writing from [naming the bank]."
>
> *Idem.*

6. Hobbs would immediately consummate the prearranged loan, secured by the savings certificate or certificates, and deposit the loan proceeds to his credit. The evidence does not show whether the deposit was, or was not made with the drawee bank.

7. Hobbs (taking the view most favorable to the Government) would then notify the Association, which would deposit the check and enter the transaction into its computer. At that time, and not before, interest would commence to accrue upon the savings certificate.

8. Hobbs' check would be paid by the drawee bank. *Every* check given by Hobbs as payment for a savings certificate was paid when presented.

9. Either (a) Hobbs would pay off the loan secured by the savings certificate or certificates, and the pledgee bank would release its assignment, or (b) at the request either of Hobbs or the pledgee bank, the proceeds of the savings certificate would be paid the pledgee bank. One of the other of these occurred with respect to *every* certificate, including those involved in Counts Two, Three and Five.

10. In each instance, the savings certificates were prepared on the regular Association forms for that purpose and signed by an authorized officer of the Association.[2]

REASONS FOR GRANTING THE WRIT

I

The decision of the Fifth Circuit is in conflict with decisions of other Courts of Appeals on the same matter; i.e., what constitutes a "falsely made" security.

The matter of this particular conflict in decisions is not a mere technicality, but one of considerable importance in the administration of justice in our courts. The 1978 Annual Report of the Director, Administrative Office of the United States Courts, Table D-2, Page A-55, discloses that of 34,624 criminal cases commenced in the

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[2] All of the certificates involved here were signed by Mrs. Jane P. Anderson, an authorized signatory of the Association, but with Mitchell's authorization. "I just told Mrs. Anderson to handle Mr. Hobbs however he desired to be handled, because he had four and a half million dollars in there [the Association] . . ." [T, 970].

twelve-month period ending June 30, 1978, 302 involved "transportation, etc., of stolen property". We cannot determine with any degree of accuracy what proportion of these cases involved "falsely made" securities, but an examination of the annotations to 18 U.S.C. § 2314 reasonably supports the conclusion there are a substantial number of such cases.

The guilt or innocence of a citizen should not depend upon the geographical location of the court in which he may be prosecuted.

An unbiased comment upon the state of the law is contained in the opening synopsis of *Annotation* (1970), 4 ALR Fed. 793 which reads:

> "The law is unsettled with respect to the characteristics of a 'falsely made, forged, altered or counterfeited' security within the meaning of the subject statute [18 U.S.C. § 2314]. The terms 'altered' and 'counterfeited' usually not being discussed by the courts, the existing conflict within the federal jurisdiction centers around the terms 'falsely made' and 'forged', with respect to which the decisions manifest general disagreement as to whether they are synonymous, or under what circumstances the use of an assumed or ficticious name would constitute forgery."

4 ALR Fed. at 797-798.

In its opinion, first quoting the following sentence from *U.S.* v. *Huntley*, 535 F.2d 1400, 1402 (5th Cir., 1976),[3] the Fifth Circuit held here:

> "We think it apparent that the purpose of the term 'falsely made' was to broaden the statute beyond rigorous concepts of forgery and to prohibit the fraudulent introduction into commerce of falsely made documents *regardless of the precise method* by which the introducer or his confederates effected their lack of authenticity (emphasis added)."
>
> (Emphasis in the Court's.)

and continues,

> "Consequently our determination of 'falsely made' is not limited to the genuineness of the execution of a document. Moreover, this court has stated '[t]he making of a draft with the *knowledge* that there is no obligation . . . would tend to falsify the nature of the instrument . . .' (emphasis added). *United States* v. *Hagerty*, 561 F.2d 1197, 1199 (5th Cir., 1977). Reasoning thusly, *when we go beyond the execution of the CD's and review the underlying facts*, we find fully enough evidence to uphold a finding by the jury that the security was 'falsely made' ".
>
> Appendix, ——a; 588 F.2d at 484. (Last emphasis is ours.)

Thus, the view adopted by the Fifth Circuit we interpret to mean that if an *authentic* security has shady antecedents, it becomes "falsely made." How "shady" is a matter of conjecture.

The decision for which review is sought is in irreconcilable conflict with the decisions of other Courts of Appeal.

The leading case is *Marteney* v. *U.S.*, 216 F.2d 760 (10th Cir., 1954), where appellant moved in arrest of judgment entered on a plea of guilty. He had transported in interstate commerce a warehouse receipt of the Garden Grain and Seed Company evidencing that 60,000 bushels of No. 2 yellow milo were received in store from one C. M. Henderson when, in fact, Garden Grain did not receive any milo in store from Henderson and on the date that warehouse receipt was issued, Garden Grain was actually short some 300,000 bushels of milo.

[3] For what it is worth, we note that *Huntley* was decided July 29, 1976, more than three years after the latest transaction involving Mitchell.

"Falsely made" and "forged" were deemed to be synonymous. The Tenth Circuit then held:

> "* * * Plainly upon the face of the charges, the warehouse receipts were actually what they purported to be. Their falsity lies in the representation of facts, not in the genuineness of execution. We can see no difference in the counts in this indictment and those in the true-name check cases."
>
> 216 F.2d at 763-764.

Thus the Tenth Circuit holding is that if a security is genuine in execution, even though it may state false facts, it is not "falsely made" within the meaning of 18 U.S.C. § 2314. This is in direct conflict with the Fifth Circuit decision sought to be reviewed.

The Fourth Circuit follows the Tenth Circuit. In *U.S.* v. *Jones*, 553 F.2d 351 (4th Cir., 1977), there was a case of computer fraud. Inglis, Limited, was a wholly owned Canadian subsidiary of Whirlpool Corporation which sold it substantial amounts of materials. A confederate of the defendant was supervisor of Inglis' accounts payable department, and caused a phony account to be set up in the name of "A. L. E. Jones", which was assigned an accounts payable code. Proper vouchers were made for accounts payable to Whirlpool, but the confederate caused the Jones payment code to be substituted for the Whirlpool code. When data for the Whirlpool accounts were fed into the computer with the phony code, it produced authentic checks, but payable to "A. L. E. Jones". These were mailed to defendant in Baltimore and deposited to his account. The sole issue was whether these checks were "falsely made, forged, altered, counterfeited or spurious" within the meaning of the last clause of 18 U.S.C. §§ 2314 and 2315 excluding the statutes' application to a security issued by a corporation of any foreign country.

Following *Greathouse* v. *U.S.*, 170 F.2d 512 (4th Cir., 1948), the Fourth Circuit held that the terms "falsely made, forged, altered or counterfeited" are substantially synonymous and refer to the crime of forgery. In overruling the district court, it held:

> "* * * We think, however, that the acts of *Everston* [the confederate] did not constitute the *making* of a false writing, but rather amounted to the creation of a writing which was genuine in execution but false as to the statements of fact contained in such writing. The distinction is crucial to the sufficiency of the indictment.
>
> " 'In criminal cases the great weight of authority holds false statements in or fraudulent execution of otherwise valid instruments not to be forgery within its common law or unexpanded meaning. *Greathouse* v. *United States*, 4 Cir., 170 F.2d 512, 514; *United States* v. *Brown*, 2 Cir. 1957, 246 F.2d 541; *Marteney* v. *United States*, 10 Cir. 1954, 216 F.2d 760; 41 A.L.R. 229, supplemented, 49 A.L.R. 1529, 51 A.L.R. 568.' "
>
> "*First National Bank of South Carolina* v. *Glenn Falls Ins. Co.*, 304 F.2d 866, 870 n. 1 (4 Cir. 1962). 553 F.2d at 355. (Emphasis is the Court's.)

Speaking to the "obligation" relied upon by the Fifth Circuit, in *Jones* the Fourth Circuit said:

> "* * * The checks state that the designated amount is payable 'to the order of A.L.E. Jones,' and was implicit in such an unconditional order was the existence of an obligation running from Inglis, Limited, to the payee. There was, of course, no such obligation, but as the result of Everston's misconduct the accounting department of Inglis was defrauded into believing that the company owed a bona fide obligation to 'A.L.E. Jones' and, accordingly, issued a *genuine instrument containing a false statement of fact as to the true creditor.*"
>
> 553 F.2d at 355. (Emphasis is the Court's.)

The Second Circuit is in conflict with the decision for which review is sought. In *U.S.* v. *Brown*, 246 F.2d 541 (2d Cir., 1957), Union Carbide and Carbon Corporation had caused a letter of credit to be issued in Brown's favor in connection with the sale of manganese ore. Brown would deliver a sight draft to a Mexican bank to which was attached forged bills of lading and assayer's certificates, and genuine certificates of insurance covering the ore during shipment, which would be paid by the bank and charged against the letter of credit. Following *Marteney*, the Second Circuit held,

> "* * * The phrase 'falsely made' as used in the statute relates to the *execution* of what is defined in Section 2311 of the same title to be a security rather than to *whether its content be true or false.*"
>
> 246 F.2d at 542. (Emphasis added.)

The Ninth Circuit is in conflict with the decision for which review is sought. In *Wright* v. *U.S.*, 172 F.2d 310 (9th Cir., 1949), the defendant was convicted under § 2314 for drawing checks in Arizona signed with his own true name upon an existent Utah bank knowing he had insufficient funds on deposit to meet them on presentation. Holding that the checks were not fictitious, but exactly what they purported to be, the court reversed the defendant's conviction, saying:

> "It is our conclusion that the facts do not show the commission of an offense against the United States for the reason that the checks which appellant caused to be transported in interstate commerce, were not falsely made or forged."
>
> 172 F.2d at 312.

The Eighth Circuit has adopted a slightly different view of "false making" in *Pines* v. *U.S.*, 123 F.2d 825 (8th Cir., 1941), holding:

> "* * * To 'falsely make' is a crime not of changing or forming an instrument to resemble an existing genuine instrument or to represent that it is the act of a genuine and existing obligor, but rather to make an instrument which has no original as such and no genuine maker whose work is copied, although in form it may resemble a type of recognized security."
>
> 123 F.2d at 528.

Pines involved a Circular Letter of Credit purportedly issued by Gotham Trust Company of New York, a fictitious bank, which the Eighth Circuit held to be falsely made under the above definition.

In *Stinson* v. *U.S.*, 316 F.2d 554 (5th Cir., 1963), the Fifth Circuit, which has adopted the so-called "narrow view" of forgery [*Hubsch* v. *U.S.*, 256 F.2d 820 (5th Cir., 1958)], picked up and adopted the *Pines* rule where the defendant filled out stolen blank checks and signed them with a fictitious name, and held that to be a "falsely made" security. In *U.S.* v. *Huntley*, 535 F.2d 1400 (5th Cir., 1976), it went one step further and held the defendant guilty under § 2314 where he used a fictitious name, "S. B. Marlin", which was a duly authorized signature for an actually existing bank account. In *U.S.* v. *Hagerty*, 561 F.2d 1197 (5th Cir., 1977), it upheld a conviction under § 2314 where the defendant would open a bank account with a draft on an out-of-state bank against the account of either a fictitious individual or of an individual who had not authorized the draft, and the draft would be returned to the institution which had already paid the defendant.

In the case at bar, however, the Fifth Circuit has extended the *Stinson-Pines* rule "beyond the execution" of the security to hold "falsely made" *genuine* savings certificates, executed on behalf of the Association by a *genuine* authorized officer, to a *genuine* purchaser, pledged to a *genuine* bank, and paid by the Association at maturity, presumably with *genuine* funds, as to which

an officer of the Association testified on trial that they were considered valid, binding obligations of the Association, according to their terms [T, 783-784]. Lacking any element of a fictitious person or fictitious name or fictitious *anything*, to hold an absolutely authentic savings certificate to be "falsely made", not only goes beyond the holdings of other courts of appeal, referred to above, but also well beyond the scope of the statute.

In all candor, had Mitchell come to us for advice, taking into consideration the facts as stated above and the authorities cited in II, *infra*, we would have advised him we would not recommend such a procedure, but that if the Association cared to assume the risk Hobbs' checks might not be paid at presentation, we could see no violation of a criminal statute. We suggest any member of this Court might have given the same advice.

II

We respectfully submit that there is *no* evidence to support a conclusion either that the savings certificates were "falsely made" or that any fraud was perpetrated, and that the decision of the Fifth Circuit therefore deprives Mitchell of his liberty without due process of law. The question is not whether the evidence is sufficient to support the conviction, but whether there is *any* evidence that the certificates were falsely made.

Garner v. *Louisiana*, 368 U.S. 157 (1961). In reviewing the evidence, we are not concerned whether it proves commission of some other crime, for it is as much a denial of due process to send an accused person to prison following a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction.

Idem.

Where, as here, the Fifth Circuit in considering a charge that petitioner transported a "falsely made se-

curity" in interstate commerce goes *beyond the execution* (i.e., "making"), it becomes apparent that Mitchell is being sent to prison on a charge that was never made.

The counts of the indictment do not charge, and it is apparent from the proof that there could be no support for any charge, that the savings certificates were forged, altered, or counterfeited. We are limited strictly to the issues of whether these certificates were "falsely made", and whether there was fraud involvd. If the certificates were valid legal obligations of the Association, according to their terms, while used as security by the pledgee banks, and if they were honored by the Association at maturity, according to their terms, we suggest that the conviction cannot stand.

First, it is undisputed that no certificate was released by the Association without receipt of a check from Hobbs in full payment. Before any release, the Association had an unconditional order directed to the drawee bank to pay the check on presentation, and Hobbs was liable to the Association in the event of dishonor (an event that never occurred). § 75-3-413, Mississippi Code of 1972 (§ 3-413 of the Uniform Commercial Code). Thus, there was a valid consideration running to the Association for issuance of the certificates.[4]

Assuming there was no consideration to the Association based upon Hobbs' check, *before any certificate entered interstate commerce*, Hobbs executed a written assignment of each to a pledgee bank, and the Association executed a written acknowledgment of the assignment, agreeing to honor it and not to release the pro-

[4] The Court may judicially know it would be a rare occasion, indeed, where a customer would pay $100,000.00 or more in *cash* for such a savings certificate. We suggest there is no crime in accepting a $100,000.00 check from a customer with $4 to $5 millions on deposit with the institution, covered by a blanket continuing guaranty, and holding it, as a matter of accommodation, for a short time before deposit.

ceeds of the certificate without a written release from the pledgee bank. Vis-a-vis the pledgee bank, the Association was legally bound to honor the certificates, whether or no it had received consideration. 6 Am.Jur. 2d, *Assignments*, § 103. Under the Government's proof, the Association acknowledges that the certificates were valid, binding obligations [T, 783-784].

The negotiability of the savings certificates was not affected by the fact they were back-dated. § 75-3-114, Mississippi Code of 1972 (3-114 of the Uniform Commercial Code) specifically provides that where an instrument is antedated or postdated the time when it is payable is determined by the stated date, which is presumed correct. The only witness to testify about the date of the certificates stated only that his bank would make loans between the inception date of the certificate and its maturity, but that they would not knowingly make a loan extending beyond the maturity date. [T, 296-297].

Of the loans involved in Counts Two, Three and Five, the $180,000.00 loan by the Bank of Aliceville was paid by Hobbs on April 24, 1973 [Government Exhibit 12(e)] and the savings certificate released; the $180,000.00 loan by the Peoples Bank and Trust Company of Selma, Alabama, was paid by Hobbs with a check drawn on another bank [T, 334] and the savings certificate released; and the $250,000.00 loan by Union Planters National Bank of Memphis was paid in January of 1974 with the proceeds of Certificate Number 9366 [T, 363], part of its security.

Now, we ask, where is there evidence of fraud?

The Association was paid in full for every certificate, paid interest only from the date of deposit, and presumably benefited from its increased deposits and lending capacity.

Hobbs did enhance his position with the Association by becoming a heavy depositor and was in a position

to receive preferred treatment competing with other borrowers seeking loans in a tight money market.

Each pledgee bank received precisely the security it was bargaining for and loans made to Hobbs were either repaid by Hobbs or with the proceeds of the certificate it held as security.[5]

If there be a "scheme", it is apparent that the intended results were achieved in each instance. The Association got the deposit and the pledgee got security which was precisely what it purported to be. Their loans, in each instance, were either repaid by Hobbs, or they got the proceeds of the savings certificate which was the security they bargained for. Mitchell got nothing but his salary and bonuses. Absent a "defraudee", or the possibility of a "defraudee", it is difficult for us to identify any basis for a finding there was fraudulent intent. We pose that same question to this Court.

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[5] Hobbs was no stranger to any of the pledgee banks. Without detailing testimony, it is undisputed that he was a substantial customer of each.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be granted and the judgment of that Court reviewed on the merits.

Respectfully submitted,

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Appendices

APPENDIX A

No. 78-5189

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

CHARLES A. MITCHELL,
Defendant-Appellant

Jan. 25, 1979

Appeal from the United States District Court
for the Northern District of Mississippi

Before THORNBERRY, AINSWORTH and MORGAN, Circuit Judges.

MORGAN, Circuit Judge.

This is an appeal by the defendant-appellant, Charles A. Mitchell, from his conviction by a jury in the United States District Court for the Northern District of Mississippi for the interstate transportation of falsely made securities in violation of 18 U.S.C. §§ 2,2314.[1] We affirm that conviction.

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[1] 18 U.S.C. § 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2314 provides in pertinent part:

Mitchell, president of Columbus Savings and Loan Association (hereinafter Association), had developed a "cash flow or cash shortage" problem as a result of unsound loans. In an effort to keep the board of directors in the dark as to the situation, Mitchell, along with Boyd Hobbs,[2] a developer of commercial property, concocted a sophisticated "kiting scheme" to put additional funds into the Association and to enable Hobbs to obtain extra loans. The transactions involved were rather complicated. Prior to his purchase of a certificate of deposit (hereinafter CD), Hobbs would make arrangements with the pledgee bank for a loan to be secured by the CD to be purchased. Mitchell would then backdate the CD and give it to Hobbs to use as security for the previously agreed upon bank loan. At the same time Hobbs would give Mitchell a check for the full amount of the CD being purchased, with the understanding that Mitchell would hold the check and not negotiate it until Hobbs gave him the okay. Simultaneously with the issuance of the CD, Hobbs would execute an assignment of the CD to the pledgee bank, which Mitchell acting on behalf of the Association would acknowledge and agree to honor. Hobbs would then transport the CD in interstate commerce to the pledgee bank which would take the CD as security for the loan to Hobbs. Hobbs would then deposit the loan proceeds in his bank account to cover or "make good" the check he had asked Mitchell to hold. Hobbs would then notify Mitchell to let the check go through. Under this scheme, from 1971 to 1973, Mitchell issued to Hobbs nearly four million dollars worth of backdated CD's.

(paragraph 3) Whoever, with unlawful or fraudulent intent, transports in interstate commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered or counterfeited shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

[2] The case against Hobbs was transferred to Alabama where he pled guilty.

Proof of a violation of paragraph 3 of Section 2314 of Title 18 of the United States Code requires the establishment of the following elements: (1) unlawful or fraudulent intent in the (2) transportation in interstate commerce of (3) any falsely made securities with (4) knowledge that the securities were falsely made. Mindful that the evidence must be viewed in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed 680 (1941), we shall proceed with our review.

Attacking the existence of the first requisite element, Mitchell argues that there was no evidence whatsoever of fraudulent intent. We cannot agree. The record furnishes ample evidence of fraudulent intent. The record shows that when Hobbs first attempted to pledge accurately dated CD's a day or two after they were issued, the pledgee banks became suspicious. Thereafter, Mitchell started backdating the CD's to make them more acceptable to the banks."[3] While particular proof of reliance on the "falsely made" aspect of the security is not necessary to sustain a conviction,[4] it is obvious that here the fictitious date was a material part of an intentional scheme to defraud. The first element of the offense is therefore satisfied.

The second element of the offense requires transportation in interstate commerce. Because the interstate element is only included to provide a constitutional basis for the exercise of federal jurisdiction, it is not necessary to show actual knowledge by Mitchell of the interstate transportation of the security. All that need be shown is the fact of the interstate transportation.[5] That

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[3] TR. 901, 902.

[4] See *United States* v. *Huntley*, 535 F.2d 1400, 1403 (5th Cir. 1976); *Stinson* v. *United States*, 316 F.2d 554, 555 (5th Cir. 1963).

[5] See *United States* v. *Feola*, 420 U.S. 671, 694, 95 S.Ct. 1255, 1269, 43 L.Ed.2d 541, where the Court said concerning a conspiracy: "[i]mposition of a requirement of knowledge of those facts that serve only to establish federal jurisdiction would render it more

fact was clearly shown in the record and therefore the second element of the offense is satisfied.

Assaulting the existence of the third element of the offense, Mitchell contends that there were no "falsely made" securities. In support of this contention Mitchell asserts that this court, in defining "falsely made," has followed the rationale of *Marteney* v. *United States*, 216 F.2d 760 (10th Cir. 1954). In *Marteney* the Tenth Circuit declared that the "falsely made" provision of Section 2314 referred to the genuineness of execution and not to the representation of facts. However, this court, in *United States* v. *Huntley*, 535 F.2d 1400, 1402 (5th Cir. 1976), *reh. en banc den.*, 540 F.2d 1086, *cert. den.* 430 U.S. 929, 97 S.Ct. 1548, 51 L.Ed.2d 773 (1977), said:

> We think it apparent that the purpose of the term "falsely made" was to broaden the statute beyond rigorous concepts of forgery and to prohibit the fraudulent introduction into commerce of falsely made documents *regardless of the precise method* by which the introducer or his confederates effected their lack of authenticity. (emphasis added).

Consequently our determination of "falsely made" is not limited to the genuineness of the execution of a document. Moreover, this court has stated "[t]he making of a draft with the *knowledge* that there is no obligation . . . would tend to falsify the nature of the instrument . . . . (emphasis added). *United States* v. *Hagerty*, 561 F.2d 1197, 1199 (5th Cir. 1977). Reasoning thusly, when we go beyond the execution of the CD's and review the underlying facts we find fully enough evidence to uphold a finding by the jury that the security was "falsely made." The evidence clearly showed that Mitchell knew that Hobbs' check would bounce if immediately negotiated and hence he knew that there was no obligation

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difficult to serve the policy behind the law . . . without serving any other apparent social policy."

on the part of the Association to honor the CD at the time it was issued. Therefore it is our conclusion that these securities were "falsely made" so as to satisfy the third element of the offense.

The fourth element of the offense, involving knowledge that the securities were "falsely made," is, of course, satisfied due to the fact that Mitchell himself was the operative in the "falsely making" of the CD's.

Concluding that all of the statutory elements of the offense are present, we next address Mitchell's argument that the jury, by returning not guilty verdicts on two of the five counts brought against him, eliminated from consideration all evidence relating to those two counts, especially where it was used in support of the three counts on which he was convicted. The rule in this circuit, however, is that where the evidence supporting a particular count is found sufficient, what the jury did on the remaining counts is immaterial to the appellate inquiry. *United States* v. *McLaurn*, 580 F.2d 811 (5th Cir. 1978). Here the evidence was sufficient to support the three counts on which Mitchell was convicted and they therefore are affirmed.

Finally, Mitchell argues that the trial court abused its discretion in sentencing him to institutional confinement. This court, however, has consistently held that: "[a] sentencing court exercises broad discretion which is not subject to appellate review 'except when arbitrary or capricious action amounting to a gross abuse of discretion is involved.'" *United States* v. *Gamboa*, 543 F.2d 545, 546 (5th Cir. 1978). The two-year jail term was well below the maximum sentence Mitchell could have received. Mitchell entirely fails to show any such gross or outrageous abuse of sentencing discretion as would warrant a modification or vacation of the sentence by this court.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-5189

D.C. Docket No. CRE-77-43-S

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

CHARLES A. MITCHELL,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Mississippi

Before THORNBERRY, AINSWORTH and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the conviction of the said District Court in this cause be, and the same is hereby, affirmed.

January 25, 1979

Issued As Mandate: Mar. 8, 1979

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-5189

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

CHARLES A. MITCHELL,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Mississippi

---

ON PETITION FOR REHEARING

(February 28, 1979)

Before THORNBERRY, AINSWORTH and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

Criminal No. CRE77-43-S

(18 USC 2)
(18 USC 371)
(18 USC 1014)
(18 USC 2314)

UNITED STATES OF AMERICA

v.

BOYD L. HOBBS, a/k/a Cotton Hobbs,
AND CHARLES A. MITCHELL

INDICTMENT

The Grand Jury charges that:

COUNT ONE

Beginning on or about August 4, 1971, and continuing to on or about April 20, 1973, in the Northern District of Mississippi the defendants, BOYD L. HOBBS, also known as Cotton Hobbs, and CHARLES A. MITCHELL did knowingly and willfully combine, conspire, confederate, and agree together with each other to commit offenses against the United States in violation of Section 371 of Title 18 of the United States Code, that is, to knowingly make and cause to be made false statements and reports and wilfully overvalue security for the purpose of influencing the action of Federal Reserve banks and banks the deposits of which were insured by the Federal Deposit Insurance Corporation, upon loans in

violation of Sections 2 and 1014, Title 18, United States Code, and with unlawful and frudulent intent to transport and cause to be transported in interstate commerce falsely made securities knowing the same to have been falsely made in violation of Sections 2 and 2314, Title 18, United States Code, it being a part of said conspiracy that CHARLES A. MITCHELL would make and issue back-dated savings certificates on The Columbus Savings and Loan Association for which funds had not been deposited and BOYD L. HOBBS would transport said certificates in interstate commerce and would pledge and assign said certificates to Federal Reserve banks and banks the deposits of which were insured by the Federal Deposit Insurance Corporation as security to influence the action of such banks on loans to Boyd L. Hobbs, and in furtherance of said conspiracy and to accomplish and effect the objects and purposes thereof the defendants committed numerous overt acts, among which were the following:

1. On or about September 3, 1971, Charles A. Mitchell caused The Columbus Savings and Loan Association savings certificate number 6048, dated January 1, 1971, in the amount of $100,000 to be issued in the name of Mr. Boyd L. Hobbs;

2. On or about September 7, 1971, Boyd L. Hobbs assigned The Columbus Savings and Loan Association savings certificate number 6048 to the First State Bank of Tuscaloosa, Tuscaloosa, Alabama;

3. On or about September 3, 1971, Charles A. Mitchell caused The Columbus Savings and Loan Association savings certificate number 6049, dated January 1, 1971, in the amount of $100,000 to be issued in the name of Mr. Boyd L. Hobbs;

4. On or about September 7, 1971, Boyd L. Hobbs assigned The Columbus Savings and Loan Association

savings certificate number 6049 to the First State Bank of Tuscaloosa, Tuscaloosa, Alabama;

5. On or about December 13, 1971, Charles A. Mitchell caused The Columbus Savings and Loan Association savings certificate number 7282, dated March 1, 1971, in the amount of $100,000 to be issued in the name of Boyd L. Hobbs;

6. On or about December 13, 1971, Boyd L. Hobbs assigned The Columbus Savings and Loan Association savings certificate number 7282 to the Bank of Mississippi, Tupelo, Mississippi;

7. On or about December 13, 1971, Charles A. Mitchell caused The Columbus Savings and Loan Association savings certificate number 7283, dated March 1, 1971, in the amount of $100,000 to be issued in the name of Boyd L. Hobbs;

8. On or about December 13, 1971, Boyd L. Hobbs assigned The Columbus Savings and Loan Association savings certificate number 7283 to the Bank of Mississippi, Tupelo, Mississippi;

9. On or about December 20, 1971, Charles A. Mitchell caused The Columbus Savings and Loan Association savings certificate number 7304, dated December 17, 1971, in the amount of $180,000, to be issued in the name of Boyd L. Hobbs;

10. On or about December 23, 1971, Boyd L. Hobbs assigned The Columbus Savings and Loan Association savings certificate number 7304 to the First State Bank of Tuscaloosa, Tuscaloosa, Alabama;

11. On or about October 31, 1972, Charles A. Mitchell caused The Columbus Savings and Loan Association savings certificate number 7960, dated December 29, 1971, in the amount of $150,000, to be issued in the name of Mr. Boyd L. Hobbs;

12. On or about October 31, 1972, Boyd L. Hobbs assigned The Columbus Savings and Loan Association savings certificate number 7960 to the Peoples Bank and Trust Company, Selma, Alabama;

13. On or about May 10, 1972, Charles A. Mitchell caused The Columbus Savings and Loan Association savings certificate number 8073, dated August 2, 1971, in the amount of $100,000, to be issued in the name of Boyd L. Hobbs;

14. On or about May 10, 1972, Boyd L. Hobbs assigned The Columbus Savings and Loan Association savings certificate number 8073 to the First Citizens National Bank, Tupelo, Mississippi;

15. On or about May 10, 1972, Charles A. Mitchell caused The Columbus Savings and Loan Association savings certificate number 8074, dated August 2, 1971, in the amount of $100,000, to be issued in the name of Boyd L. Hobbs;

16. On or about May 10, 1972, Boyd L. Hobbs assigned The Columbus Savings and Loan Association savings certificate number 8074 to the First Citizens National Bank, Tupelo, Mississippi;

17. On or about August 16, 1972, Charles A. Mitchell caused The Columbus Savings and Loan Association savings certificate number 8611, dated June 29, 1972, in the amount of $100,000, to be issued in the name of Boyd L. Hobbs;

18. On or about August 16, 1972, Boyd L. Hobbs assigned The Columbus Savings and Loan Association savings certificate number 8611 to the Bank of Mississippi, Tupelo, Mississippi;

19. On or about August 16, 1972, Charles A. Mitchell caused The Columbus Savings and Loan Association savings certificate number 8612, dated June 30, 1972, in

the amount of $100,000, to be issued in the name of Boyd L. Hobbs;

20. On or about August 16, 1972, Boyd L. Hobbs assigned The Columbus Savings and Loan Association savings certificate number 8612 to the Bank of Mississippi, Tupelo, Mississippi;

21. On or about August 16, 1972, Charles A. Mitchell caused The Columbus Savings and Loan Association savings certificate number 8613, dated June 30, 1972, in the amount of $100,000, to be issued in the name of Boyd L. Hobbs;

22. On or about August 16, 1972, Boyd L. Hobbs assigned The Columbus Savings and Loan Association savings certificate number 8613 to the First National Bank of Tuscaloosa, Tuscaloosa, Alabama;

23. On or about December 18, 1972, Charles A. Mitchell caused The Columbus Savings and Loan Association savings certificate number 9071, dated October 18, 1972, in the amount of $100,000, to be issued in the name of Mr. Boyd L. Hobbs;

24. On or about December 18, 1972, Boyd L. Hobbs assigned The Columbus Savings and Loan Association savings certificate number 9071 to the First National Bank of Aliceville, Aliceville, Alabama;

25. On or about December 18, 1972, Charles A. Mitchell caused The Columbus Savings and Loan Association savings certificate number 9072, dated October 18, 1972, in the amount of $100,000, to be issued in the name of Boyd L. Hobbs;

26. On or about December 18, 1972, Boyd L. Hobbs assigned The Columbus Savings and Loan Association savings certificate number 9072 to the First National Bank of Aliceville, Aliceville, Alabama;

27. On or about December 20, 1972, Charles A. Mitchell caused The Columbus Savings and Loan Association savings certificate number 9077, dated October 20, 1972, in the amount of $150,000, to be issued in the name of Mr. Boyd L. Hobbs;

28. On or about December 20, 1972, Boyd L. Hobbs assigned The Columbus Savings and Loan Association savings certificate number 9077 to the Citizens Bank of Hattiesburg, Hattiesburg, Mississippi;

29. On or about March 21, 1973, Charles A. Mitchell caused The Columbus Savings and Loan Association savings certificate number 9366, dated January 19, 1973, in the amount of $100,000, to be issued in the name of Mr. Boyd L. Hobbs;

30. On or about March 21, 1973, Boyd L. Hobbs assigned The Columbus Savings and Loan Association savings certificate number 9366 to the Union Planters National Bank of Memphis, Memphis, Tennessee;

(nm $10,000 or nm 5 years, or both)

COUNT TWO

On or about October 31, 1972, in the Northern District of Mississippi, BOYD L. HOBBS, also known as Cotton Hobbs, and CHARLES A. MITCHELL, defendants, aided and abetted by each other, did, with unlawful and fraudulent intent, transport and cause to be transported in interstate commerce from Lowndes County in the State of Mississippi to the State of Alabama a falsely made security, knowing the same to have been falsely made, that is, The Columbus Savings and Loan Association savings certificate number 7960 in the amount of $150,000, dated December 29, 1971; in violation of Sections 2 and 2314, Title 18, United States Code.

(nm $10,000 or nm 10 years, or both)

COUNT THREE

On or about December 18, 1972, in the Northern District of Mississippi, BOYD L. HOBBS, also known as Cotton Hobbs, and CHARLES A. MITCHELL, defendants, aided and abetted by each other, did, with unlawful and fraudulent intent, transport and cause to be transported in interstate commerce from Lowndes County in the State of Mississippi to the State of Alabama a falsely made security, knowing the same to have been falsely made, that is, the Columbus Savings and Loan Association savings certificate number 9071 in the amount of $100,000, dated October 18, 1972, and the Columbus Savings and Loan Association savings certificate number 9072 in the amount of $100,000 dated October 18, 1972; in violation of Sections 2 and 2314, Title 18, United States Code.

(nm $10,000 or nm 10 years, or both)

COUNT FOUR

On or about December 20, 1972, in the Northern District of Mississippi, BOYD L. HOBBS, also known as Cotton Hobbs, and CHARLES A. MITCHELL, defendants, aided and abetted by each other, did knowingly and willfully make and cause to be made a false statement for the purpose of influencing the action of The Citizens Bank of Hattiesburg, Hattiesburg, Mississippi, the deposits of which were then insured by the Federal Deposit Insurance Corporation, upon a loan, that is, they did make and issue The Columbus Savings and Loan Association savings certificate number 9077, in the amount of $150,000, dated October 20, 1972, and did submit and assign said certificate to The Citizens Bank of Hattiesburg to influence said bank to make a loan to Boyd L. Hobbs, and they well knew that the certificate had been back-dated and the funds represented by said

certificate had not been deposited with The Columbus Savings and Loan Association; in violation of Sections 2 and 1014, Title 18, United States Code.

(nm $5,000 or nm 2 years, or both)

COUNT FIVE

On or about March 21, 1973, in the Northern District of Mississippi, BOYD L. HOBBS, also known as Cotton Hobbs, and CHARLES A. MITCHELL, defendants, aided and abetted by each other, did, with unlawful and fraudulent intent, transport and cause to be transported in interstate commerce from Lowndes County in the State of Mississippi to the State of Tennessee a falsely made security, knowing the same to have been falsely made, that is, The Columbus Savings and Loan Association savings certificate number 9366 in the amount of $100,000, dated January 19, 1973; in violation of Sections 2 and 2314, Title 18, United States Code.

(nm $10,000 or nm 10 years, or both)

A TRUE BILL

/s/ [Illegible]
Foreman

/s/ [Illegible]
United States Attorney

Supreme Court, U. S.
FILED
MAY 30 1979
MICHAEL RODAK, JR., CLERK

No. 78-1486

In the Supreme Court of the United States

OCTOBER TERM, 1978

CHARLES A. MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ELLIOTT SCHULDER
Attorney
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 588 F.2d 481.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6a) was entered on January 25, 1979. A petition for rehearing was denied on February 28, 1979 (Pet. App. 7a). The petition for a writ of certiorari was filed on March 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether backdated certificates of deposit issued without the actual deposit of funds are "falsely made" securities within the meaning of 18 U.S.C. 2314.

STATUTE INVOLVED

18 U.S.C. 2314 provides in pertinent part:

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; * * *
>
> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Mississippi, petitioner was convicted on three counts of interstate transportation of falsely made securities, in violation of 18 U.S.C. 2314.[1] He was sentenced to concurrent terms of two years' imprisonment.[2] The court of appeals affirmed (Pet. App. 1a-5a).

[1] Petitioner was acquitted of making a false statement to a federally-insured bank, in violation of 18 U.S.C. 1014, and of conspiracy to violate 18 U.S.C. 1014 and 2314.

[2] The proceeding against co-defendant Boyd Hobbs was transferred to the Northern District of Alabama, where Hobbs pleaded guilty to one count of the indictment and was sentenced to one year's imprisonment (I R. 26-27). ("R." refers to the seven-volume record in the court of appeals, which contains the trial transcript.)

The relevant facts are not in dispute (Pet. 4). Petitioner was president of the Columbus Savings and Loan Association. In 1971 the Association developed "cash flow or cash shortage problems" as a result of unsound loans (V R. 958, 975-976).[3] Petitioner sought to conceal those problems from the Association's board of directors; together with co-defendant Boyd Hobbs, a developer of commercial properties, petitioner devised a sophisticated "kiting" scheme to increase the Association's cash reserves (Pet. App. 2a).

The scheme involved the issuance of certificates of deposit by the Association without the actual deposit of funds (III R. 421-424, 520-531; V R. 965-967). Co-defendant Hobbs would arrange with out-of-state banks to obtain business loans to be secured by certificates of deposit. Petitioner would then issue backdated certificates of deposit and give them to Hobbs for use as collateral.[4] Petitioner also authorized as-

[3] By August 1971, the Association's liquidity problems had reached the point where it had a $243,000 deficit balance at its depository bank, and savings withdrawals exceeded deposits by $50,000. Thus, if all the Association's outstanding checks were presented for payment, it would have been seriously overdrawn and would have had to borrow against legally required reserve deposits to meet its obligations (IV R. 831-835; V R. 887-890, 959-965; Gov't Ex. 50 at 18).

[4] The certificates were issued in two different forms. Each form certified that Hobbs had placed funds on deposit in the Association as of the "date" of issue (Gov't Ex. 6a, 12a, 13a, 15a). The backdating of the certificates was essential to the success of the scheme (Pet. App. 3a). When Hobbs first attempted to pledge accurately dated certificates shortly after

signments of the certificates to the pledgee banks. In exchange for the certificates, Hobbs gave petitioner checks or drafts in the amount of the face value of the certificates. Pursuant to a previous agreement, however, petitioner did not negotiate the checks or enter the transactions in the Association's ledger.

Hobbs then transported the certificates in interstate commerce to the pledgee banks, which accepted the certificates as collateral for their loans to Hobbs. Hobbs later deposited the loan proceeds in his account to cover the checks that he had previously written. Upon receiving notification from Hobbs that the checks were covered, petitioner negotiated the checks and recorded the transactions on the Association's books (reflecting receipt of the checks and issuance of the certificates) (V R. 991).

Over a two-year period, petitioner issued to Hobbs nearly $4 million in backdated certificates of deposit (IV R. 783). During that period, petitioner also approved loans to Hobbs totalling several million dollars, which petitioner concealed from the Association's board of directors (IV R. 696-700, 701-708; V R. 940-942; 948-949; Gov't Ex. 55). The Association lost

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they were issued, officers of the pledgee banks questioned why the certificates were being pledged immediately after issuance (III R. 522-524). Thereafter, petitioner backdated all of the certificates in order to insure that they would be acceptable to the lending banks (V R. 983-986). Because the certificates represented that Hobbs held substantial assets at the Association, his credit worthiness was enhanced. Petitioner admitted that "anyone reading the certificate would assume that those deposits were actually there in the Association" (V R. 991).

substantial amounts of money when Hobbs defaulted on these loans; the full extent of the Association's losses were undetermined at the time of trial (IV R. 711, 764, 793-795).[5]

Petitioner conceded at trial that Hobbs' checks for the certificates of deposit were not processed through regular channels until after loans had been obtained on the certificates (V R. 904-906, 966-970, 978-979, 987, 991-993). He also admitted that although the certificates purported to represent deposits on account at the Association on the date they were issued (V R. 991), the Association would not have been obligated to pay Hobbs unless and until his checks had cleared (V R. 993-995).[6]

In its instructions to the jury, the district court stated (VII R. 48):

> A falsely made security is one issued without any real or believed obligation on the part of the maker to pay or redeem the security on the demand of the person to whom it is issued. The issuance of a savings certificate without the actual deposit of the funds represented by the certificate does not obligate the maker to pay the purported depositor and therefore falsifies the

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[5] Approximately 10% of the Association's liabilities were in certificates issued to Hobbs; approximately 30% of its assets were in loans to Hobbs, including loan participations that had to be repurchased by the Association from other institutions when Hobbs defaulted (IV R. 781-788, 790-792; V R. 971-972, 974-977).

[6] The certificates of deposit were valid obligations of the Association as to innocent third party assignees who took them for value.

nature of the instrument within the meaning of Section 2314.

In affirming petitioner's conviction, the court of appeals held that there was sufficient evidence to support the jury's finding that the securities in question were "falsely made" within the meaning of 18 U.S.C. 2314. The court rejected the argument that the term "falsely made" relates exclusively to genuineness of execution, and concluded that the certificates of deposit were "falsely made" in this case because petitioner "knew that Hobbs' checks would bounce if immediately negotiated and hence he knew that there was no obligation on the part of the Association to honor the CD at the time it was issued" (Pet. App. 4a-5a).

ARGUMENT

The certificates of deposit involved in this case were issued at petitioner's direction and were then transported by Hobbs in interstate commerce and pledged as collateral for loans. The certificates falsely represented that Hobbs had a specified sum on deposit in an existing savings account at the Association. In addition, the certificates stated that they had been issued on a date prior to the date on which they actually were issued. The question here is whether those certificates were "falsely made" within the meaning of 18 U.S.C. 2314. We submit that the falsely dated certificates, issued as part of a fraudulent scheme to obtain loans from other institutions by false pretenses, were "falsely made" as that term is used in Section 2314.[7]

The term "falsely made" is not defined in Section 2314 or in any of the other sections of the criminal code in which it is employed.[8] Moreover, the legislative history provides no assistance in defining "falsely made."[9] The term "forged," also appearing in the statute, was usually used at common law in reference to the "'*false* making * * * of any written instrument for the purpose of fraud and deceit.'" *Gilbert* v. *United States*, 370 U.S. 650, 656 (1962) (emphasis in original) (quoting from 2 East, *Pleas of*

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[7] The parties who were directly deceived by petitioner's scheme to negotiate false certificates of deposit were the lending banks that received them as collateral. Those lenders were deceived about the amount of assets owned by Hobbs. They were led to believe that he owned substantial, previously existing liquid assets. In fact, however, the deposits were not an independent cushion for the loans; the loans themselves were used to create the deposits under petitioner's kiting scheme. The funds of the lenders were not used to augment the resources of a business borrower with substantial collateral, but rather to supply liquidity to a savings and loan association with serious cash management and loan portfolio deficiencies.

[8] See, *e.g.*, 18 U.S.C. 478 (foreign obligations or securities), 18 U.S.C. 495 (contracts, deeds, and powers of attorney), 18 U.S.C. 507 (ship's papers), 18 U.S.C. 1426 (naturalization or citizenship papers), 18 U.S.C. 1543 (passports).

[9] The predecessor of the provision at issue here was enacted in 1939 as an amendment to the National Stolen Property Act, ch. 413, 53 Stat. 1178. The committee reports do not discuss the intended meaning of the term "falsely made." See S. Rep. No. 674, 76th Cong., 1st Sess. (1939); H.R. Rep. No. 422, 76th Cong., 1st Sess. (1939).

the Crown 852 (1803)); see also *id.* at 656-657 & nn.8-10.

While it is clear that forgery and false making are closely related concepts, the lower courts disagree over whether the term "falsely made," as used in Section 2314 and its predecessors, was meant to be synonymous with forgery or was intended to have a broader meaning. The Fourth, Seventh and Tenth Circuits hold that the two terms are essentially synonymous. See *United States* v. *Jones*, 553 F.2d 351, 354 (4th Cir.), cert. denied, 431 U.S. 968 (1977); *Greathouse* v. *United States*, 170 F.2d 512, 514 (4th Cir. 1948); *United States* v. *Johnson*, 504 F.2d 622, 625 (7th Cir. 1974); *United States* v. *Crim*, 527 F.2d 289, 294 (10th Cir. 1975), cert. denied, 425 U.S. 905 (1976); *United States* v. *Williams*, 498 F.2d 547, 551 (10th Cir. 1974); *Marteney* v. *United States*, 216 F.2d 760, 763 (10th Cir. 1954). On the other hand, the Fifth, Sixth, and Eighth Circuits adhere to the view that "the purpose of the term 'falsely made' was to broaden the statute beyond rigorous concepts of forgery and to prohibit the fraudulent introduction into commerce of falsely made documents regardless of the precise method by which the introducer or his confederates effected their lack of authenticity." *United States* v. *Huntley*, 535 F.2d 1400, 1402 (5th Cir. 1976), cert. denied, 430 U.S. 929 (1977). See *United States* v. *Hagerty*, 561 F.2d 1197, 1199 (5th Cir. 1977); *Stinson* v. *United States*, 316 F.2d 554, 555-556 (5th Cir. 1963); *United States* v. *Tucker*, 473 F.2d 1290, 1293-1294

(6th Cir.), cert. denied, 412 U.S. 942 (1973); *Pines* v. *United States*, 123 F.2d 825, 828 (8th Cir. 1941).

In cases construing the term "forgery" under various statutes, the courts "have generally drawn a distinction between false or fraudulent statements and spurious or fictitious makings." *Gilbert* v. *United States*, *supra*, 370 U.S. at 658. Where the falsity lies in the representation of underlying facts described in a document, but not in the genuineness of its execution, forgery is generally found not to exist. *Ibid.* The same distinction between falsity of representation and execution has also been applied by a number of courts in interpreting the "falsely made" provision of Section 2314. See *United States* v. *Jones*, *supra*, 553 F.2d at 355; *United States* v. *Johnson*, *supra*, 504 F.2d at 625-626; *Melvin* v. *United States*, 316 F.2d 647, 648 (7th Cir. 1963); *United States* v. *Brown*, 246 F.2d 541, 542 (2d Cir. 1957); *Marteney* v. *United States*, *supra*, 216 F.2d at 763-764; *Wright* v. *United States*, 172 F.2d 310, 311 (9th Cir. 1949); *Greathouse* v. *United States*, *supra*, 170 F.2d at 514.

Thus, under this restrictive view, a security is not falsely made within the statutory definition if it is drawn by the maker in his own name on an existing bank in which he has inadequate funds, since in that situation the security is authentic in its execution; the falsity is merely in the implicit representation that adequate funds are on account at the institution. See, *e.g.*, *United States* v. *Metcalf*, 388 F.2d 440, 442 n.4 (4th Cir. 1968); *Hall* v. *United States*, 372 F.2d

603, 607 n.8 (8th Cir. 1967); *Marteney* v. *United States, supra,* 216 F.2d at 763; *Wright* v. *United States, supra,* 172 F.2d at 311-312. But see *United States* v. *Hagerty, supra.* A security drawn on a nonexistent institution, however, is falsely made under Section 2314, since there could be no genuine instrument issued by a fictitious bank. See, *e.g., United States* v. *Lipscomb,* 546 F.2d 787 (8th Cir. 1976), cert. denied, 430 U.S. 970 (1977); *Pines* v. *United States, supra,* 123 F.2d at 828. Similarly, the statute is deemed to have been violated if the maker uses a fictitious name or an unauthorized signature of another in drawing the security. See, *e.g., United States* v. *Huntley, supra,* 535 F.2d at 1403; *United States* v. *Crim, supra,* 527 F.2d at 294; *United States* v. *Seay,* 518 F.2d 646, 647-648 (7th Cir.), cert. denied, 423 U.S. 995 (1975); *United States* v. *Tucker, supra,* 473 F.2d at 1294.

Even though there is disagreement among the circuits about the outer limits of Section 2314, that disagreement is not material to the outcome of the present case. The certificates of deposit involved here were falsified during the process of execution, in furtherance of petitioner's fraudulent scheme.[10] The

[10] The fraudulent backdates were integral parts of the execution of the certificates of deposit. See Government Exhibits 12a, 13a, and 15a, which were executed as follows:

> "WITNESS the seal of the undersigned and the signature of its duly authorized officers, this the 18 day of October 1972. THE COLUMBUS SAVINGS AND LOAN ASSOCIATION Jane P. Anderson."

false backdating in the execution of the certificates was just as much fraud in the making of the securities as if a false signature had been affixed to them. None of the cases cited by petitioner holds otherwise, or suggests that fraudulent backdating is not falsity in the execution of a security.[11] Thus, while there may be disagreement among the circuits concerning the precise scope of the term "falsely made," that disagreement is not significant here; to the contrary, it appears that the other circuits (including those that require fraud in the execution of the security or equate false making with forgery) would likely agree with the Fifth Circuit in this case that securities that are falsely backdated when executed as part of a scheme to defraud are "falsely made."

See also Government Exhibit 6a, which was executed as follows:

> "Date December 29, 1971
> The Columbus Savings and Loan Association
> By Jane P. Anderson"

[11] Moreover, even if "false making" is defined narrowly as the equivalent of "forgery," it is significant that forgery was not limited at common law to the act of simulating another person's signature; rather, forgery was held to encompass the fraudulent making or altering of a writing to the detriment of another. See *Gilbert* v. *United States, supra,* 370 U.S. at 656-657 & nn.8-10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1978

No. 78-1486

CHARLES A. MITCHELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I

We respectfully submit that the Brief for the United States in Opposition (cited "BO, p. —") buttresses our argument that the writ of certiorari should be granted.

The parameters of the word, "forged", as used in Section 2314 are well established. See: *Gilbert* v. *U.S.*, 370 U.S. 650, 656-59 (1962). On the other hand, the term, "falsely made", is of fairly recent legislative origin without the benefit of a definition in any of the other sections of the criminal code in which it is employed.

The legislative history gives no clue as to the meaning intended by Congress. [BO, p. 7] It is not, therefore, surprising that there is wide disagreement among the various circuits as to the meaning of the term. See: *Annotation* (1970), 4 A.L.R.Fed. 793, 797-798.

On the undisputed facts of this case, had Petitioner been indicted in any one of the 37 states comprising the Second, Fourth, Sixth,[1] Seventh, Eighth,[2] Ninth and Tenth Circuits, his preliminary motions to strike Counts Two, Three and Five of the indictment [Pet., 13a-15a], and his motions for a directed verdict of "Not Guilty" on those counts would have been sustained on the ground they failed to charge an offense against the United States. In the 7 states comprising the First and Third Circuits and the District of Columbia, we suggest the courts might well have followed the majority, better-reasoned rule and sustained similar motions.

We say again, guilt or innocence of a defendant under federal indictment should not be dependent upon the geographical location of the Court in which he is tried.

II

In *Garner* v. *Louisiana*, 368 U.S. 157 (1961), the Court's inquiry was not as to the sufficiency of evidence, but on whether the convictions rested upon *any* evidence

[1] *U. S.* v. *Tucker*, 473 F.2d 1290 (6th Cir., 1973), is bottomed on a sight draft executed in the name of a fictitious person. There are no fictitious parties in this case.

[2] *Pines* v. *U. S.*, 123 F.2d 825 (8th Cir., 1942), involved "U. S. Dollar Travelers Cheques" and a "Circular Letter of Credit" purportedly issued by the Gotham Trust Company of New York, a non-existent institution. *U. S.* v. *Lipscomb*, 546 F.2d 787 (8th Cir., 1976), involved an instrument drawn on a non-existent drawee. In the case at bar, it is undisputed that the Columbus Savings & Loan Association was a genuine, existing association, and that the savings certificates involved were issued by it and signed by an authorized officer.

which would support a finding that petitioners' acts caused a disturbance of the peace, that being the charge upon which they had been convicted. In connection with that inquiry, this Court said:

> "In addition, we cannot be concerned with whether the evidence proves the commission of some other crime, for it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction." 368 U.S. at 165.

We suggest, *a fortiori*, that it is a denial of due process to send this Petitioner to prison on evidence that might prove the commission of other crimes upon which he was indicted and found "Not Guilty".

In this case, Petitioner was indicted and tried on Count One [Pet., 9a-13a] with Boyd L. Hobbs ("Hobbs") for a conspiracy (1) to knowingly make false statements and over-value securities for the purpose of influencing the action of federal reserve banks or banks with FDIC-insured deposits on loans to Hobbs, and (2) to transport, with unlawful and fraudulent intent, falsely made securities in interstate commerce, in that Petitioner would issue back-dated savings certificates of The Columbus Savings and Loan Association for which funds had not been deposited, and Hobbs would transport them in interstate commerce and would pledge and assign them to banks as security to influence their action on loans to Hobbs.

On this count, the jury found Petitioner "Not Guilty".

Petitioner was indicted and tried on Count Four [Pet., 14a] charging he made such a false statement for the purpose of influencing the action of The Citizens Bank of Hattiesburg, Mississippi, on a loan to Hobbs by making and issuing an Association savings certificate number

9077, in the amount of $150,000, dated October 20, 1972, knowing it had been back-dated and the funds represented by said certificate not deposited with the Association.

On this count, the jury found Petitioner "Not Guilty".

Counts Two, Three and Five [Pet., 13a-15a] charged Petitioner with having transported specific savings certificates as "falsely made securities" in interstate commerce in that they had been back-dated and in that funds represented by the securities were not on deposit with the Association. The specific savings certificates named in these counts were numbers 7960, 9071, 9072, and 9077, and the inquiry should be into whether these specific certificates were "falsely made". It is admitted that each was back-dated, and the evidence is undisputed that each was a genuine certificate executed by an authorized officer, that Hobbs gave his check for each before delivery, that each was assigned by Hobbs to the pledgee bank, and that each assignment was acknowledged *before delivery* to Hobbs and *before transport* in interstate commerce.[3] The only possible question would be whether Hobbs' checks would have been good if immediately presented for payment.[4] The evidence is totally inconclusive on this point. Hobbs testified that during this period he had a cash flow of over $100,000 per day, and that without consulting his records he could not say whether there would or would not have been sufficient funds to cover any specific check. [T. 529, 587] There is *no* evidence that checks given in payment for the specific savings certificates named in Counts Two, Three and Five would not have been good.

Petitioner went to trial in the district court prepared to defend the specific charges in the indictment. With the magic wand of the conspiracy charge, he found the evidentiary flood gates opened and was put to a defense, not on the offenses charged in the indictment, but on the unstated charge that he had caused substantial losses to the Association as a result of misplaced trust in Hobbs. [T. 201-209]

It is apparent to us that Respondent seeks to sustain the convictions under review, not by addressing the question of whether these four certificates were or were not "falsely made", but by reliance upon evidence material and relevant only to the charges of conspiracy and making false statements to a bank to influence loans *upon which Petitioner was acquitted.*[5] [BO, p. 3-6; p. 7, footnote 7]

[3] Respondent apparently concedes that the certificates were valid obligations of the Association as to the pledgee banks [BO, p. 5, footnote 6]. The evidence is undisputed that the assignments were executed by Hobbs and acknowledged by the Association in writing *before* entering interstate commerce. Thus the securities transported in interstate commerce, being valid obligations, could not be "falsely made".

[4] *Had* the United States wanted to introduce evidence on this point, it would have been a simple matter. Its evidence traces each of Hobbs' checks into an Association deposit. All needed would have been for the United States to subpoena a microfilm of each check from the bank in which it was deposited, and the ledger sheet of the Hobbs account upon which it was drawn covering a period that included the date the check was written and the date it was charged to the account. This would be the "best evidence" and easily obtained with the Government's resources, but it was certainly not offered at trial.

[5] We do not respond to mis-statements in Respondent's brief solely because we consider it inappropriate to argue the merits of the case on petition for a writ of certiorari. This is not to say we agree with Respondent's statement of the case. For example, " 'cash flow or cash shortage problems' as a result of unsound loans" [BO, p. 3] relates, not to the Association's actual liquidity, but to Petitioner's policy of money management to maximize cash in interest-bearing investments and to minimize the amounts in non-interest bearing checking accounts on which the association had to pay interest to its depositors. [T, 887-890] At all times, as to which the examination related, the Association had $2,500,000 in bank CD's against which it could borrow to cover any actual overdraft [T, 945]. The "shortages" or overdrafts would occur *only* if all outstanding checks were to be presented at once, which did not happen. [T, 889].

CONCLUSION

There is a pressing need to establish parameters for the term, "Falsely made". There is no assistance from the legislative history of Section 2314. The Fourth, Seventh, and Tenth Circuits say that "falsely made" means the same thing as "forged". The Second and Ninth Circuits say that a genuine check or draft does not become "falsely made" because there are insufficient funds for the check or because spurious supporting documents are attached to the draft. The Sixth and Eighth Circuits say that use of a fictitious drawer or drawee makes a draft "falsely made". The Fifth Circuit presses to the limit in *U.S.* v. *Hagerty*, 561 F.2d 1197 (5th Cir. 1977), holding an unauthorized draft on the account of an existing person becomes "falsely made". Here, the Fifth Circuit's "determination of 'falsely made' is not limited to the genuineness of the execution of a document. * * * we go beyond the execution of the CD's and review the underlying facts we find fully enough evidence to uphold a finding by the jury [6] that the security was 'falsely made' ". [Pet., p. 4a] If the court "goes beyond" the term, "falsely made", then this conviction rests on something "beyond" Section 2314, and violates due process.

We suggest there is a pressing need for this Court to set the limits for the term, "falsely made", purely aside from considerations of dishonor, shame,[7] and loss of substantial citizenship rights. Petitioner will suffer if this conviction stands.

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[6] With deference, whether an instrument is "falsely made" is a question of law—not a question of fact to be found by a jury.

[7] E.g., "Your daddy is a convict".

For these reasons, here and in the petition, the writ should be granted.

Respectfully submitted,

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